

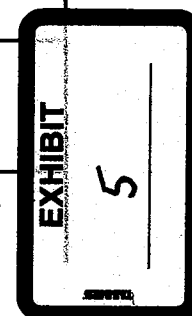
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**U.S. District Court
Eastern District of Michigan (Detroit)
CIVIL DOCKET FOR CASE #: 2:03-cv-72652-JCO**

Kahn, et al v. CSX Trans
Assigned to: Honorable John Corbett O'Meara
Demand: \$0

Date Filed: 07/11/2003
Jury Demand: Both
Nature of Suit: 240 Torts to Land
Jurisdiction: Diversity

Date Filed	#	Docket Text
06/21/2005	<u>70</u>	STIPULATED ORDER DISMISSING CASE Signed by Honorable John Corbett O'Meara. (PPaul,) (Entered: 06/24/2005)
06/21/2005	<u>69</u>	CORRECTED page 7 of the Settlement and Mutual Release Agreement, Exhibits A(RHutc,). Modified on 6/24/2005 (RHutc,). (Entered: 06/23/2005)
04/12/2005		Minute Entry -Settlement Conference held on 4/12/2005 before Honorable Bernard A Friedman. Disposition: Settled(Court Reporter Joan Morgan) (CMul,) (Entered: 04/15/2005)
04/05/2005	<u>68</u>	Letter from Plaintiffs (PPaul,) (Entered: 04/06/2005)
03/18/2005	<u>67</u>	TRANSCRIPT of Proceedings held on 1/28/05 of hearing on Motion for Class Certification (RHutc,) (Entered: 03/22/2005)
03/10/2005	<u>66</u>	NOTICE TO APPEAR: Settlement Conference set for 4/12/2005 9:00 AM before Honorable Bernard A Friedman. (DOpa,) (Entered: 03/10/2005)
01/28/2005		Minute Entry -Motion Hearing held on 1/28/2005 re <u>62</u> MOTION for Sanctions MOTION to Strike <u>55</u> Response to Motion and <u>26</u> MOTION to Certify Class before Honorable John Corbett O'Meara. Disposition: Taken Under Advisement(Court Reporter Andrea Wabeke) (DOpa,) (Entered: 02/11/2005)
01/14/2005	<u>65</u>	REPLY to Defendant's Response to <u>26</u> MOTION to Certify Class filed by plaintiffs; with exhibit 1. (JGIlb,) (Entered: 01/19/2005)
01/07/2005	<u>64</u>	NOTICE of hearing on <u>62</u> MOTION for Sanctions MOTION to Strike <u>55</u> Response to Motion. Motion Hearing set for 1/28/2005 02:00 PM before Honorable John Corbett O'Meara. (VSim,) (Entered: 01/08/2005)
01/07/2005	<u>63</u>	RESPONSE to <u>62</u> MOTION for Sanctions MOTION to Strike <u>55</u> Response to Motion filed by CSX Transportation. (Meeks, Mark) (Entered: 01/07/2005)
01/05/2005	<u>62</u>	MOTION to STRIKE <u>55</u> Defendant's Exhibit 4 to and/or Response to



		Plaintiffs' Motion for Class Certification and to Apply SANCTIONS by plaintiffs. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>61</u>	VOLUME VI: ATTACHMENTS 31-41 TO <u>55</u> Response to Motion for Class Certification by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>60</u>	EXHIBIT: Remedial Investigation Report (Vol. 2 of 2) to <u>55</u> Response to Motion for Class Certification by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>59</u>	VOLUME 4: ATTACHMENTS 21-29 TO <u>55</u> Response to Motion for Class Certification by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>58</u>	ATTACHMENTS 11-20 TO <u>55</u> Response to Motion by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>57</u>	VOLUME 2: ATTACHMENTS 1-10 TO <u>55</u> Response to Motion by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>56</u>	VOLUME 1: EXHIBITS 1-4 to <u>55</u> Response to Motion by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/30/2004	<u>55</u>	RESPONSE in Opposition to <u>26</u> MOTION to Class Certification filed by CSX Transportation. (JGilb,) (Entered: 01/06/2005)
12/14/2004	<u>54</u>	MOTION for Leave to File Excess Pages in <i>Addressing Class Certification Issues</i> by CSX Transportation. (Meeks, Mark) (Entered: 12/14/2004)
10/26/2004	<u>53</u>	TRANSCRIPT of Proceedings held on October 1, 2004 of Motion for Summary Judgment (JGilb,) (Entered: 10/28/2004)
10/22/2004	<u>52</u>	Mail Returned as Undeliverable. Mail sent to Andrea Rose re <u>51</u> Order on Motion to Dismiss (JGilb,) (Entered: 10/25/2004)
10/12/2004	<u>51</u>	ORDER granting in part and denying in part <u>24</u> Motion to Dismiss -- Signed by Honorable John Corbett O'Meara. (JGilb,) (Entered: 10/13/2004)
10/01/2004		Minute Entry -Motion Hearing held on 10/1/2004 re <u>24</u> MOTION to Dismiss filed by CSX Transportation before Honorable John Corbett O'Meara. Disposition: DENIED IN PART AND GRANTED IN PART (Court Reporter Wabeke) (DGoo,) (Entered: 10/01/2004)
09/29/2004	<u>50</u>	ORDER withdrawing <u>42</u> Motion for Protective Order and withdrawing <u>45</u> Motion to Strike- Signed by Honorable Donald A Scheer. (JGilb,) (Entered: 09/30/2004)
09/17/2004	<u>49</u>	Mail Returned as Undeliverable. Mail sent to Andrea Rose re <u>44</u> Order Referring Motion to Magistrate Judge, (JGilb,) (Entered: 09/22/2004)
09/02/2004	<u>48</u>	RESPONSE to <u>42</u> MOTION for Protective Order filed by CSX Transportation; with exhibits A-D. (JGilb,) (Entered: 09/15/2004)

08/26/2004	<u>47</u>	ORDER REFERRING MOTION to Magistrate Judge SCHEER: <u>45</u> MOTION to Strike <u>42</u> MOTION for Protective Order filed by CSX Transportation. Signed by Honorable John Corbett O'Meara. (DGoo,) (Entered: 08/26/2004)
08/25/2004	<u>46</u>	NOTICE of hearing on <u>45</u> MOTION to Strike <u>42</u> MOTION for Protective Order. Motion Hearing set for 9/9/2004 02:00 PM before Honorable Donald A Scheer. (VSim,) (Entered: 08/26/2004)
08/24/2004	<u>44</u>	ORDER REFERRING MOTION to Magistrate Judge SCHEER: <u>42</u> MOTION for Protective Order filed by John Reynolds, Brian Kahn, Laura Kahn, Edward Danes, Ellen Danes, Eric Mockaitis, Dawn Mockaitis, Robert Buchta, Gayle L. McCreedy, Kim Conrad, Edward Conrad, Noel E. Grehl, Woodrow Daniels, Joyce Daniels, Paula Dubiel, Greg Dubiel, Joan Vangel. Signed by Honorable John Corbett O'Meara. (DGoo,) (Entered: 08/24/2004)
08/20/2004	<u>43</u>	NOTICE of hearing on <u>42</u> MOTION for Protective Order. Motion Hearing set for 9/9/2004 02:00 PM before Honorable Donald A Scheer. (VSim,) (Entered: 08/23/2004)
08/19/2004	<u>45</u>	MOTION to Strike <u>42</u> Plaintiff's MOTION for Protective Order by CSX Transportation. (JGilb,) (Entered: 08/24/2004)
08/16/2004	<u>42</u>	MOTION for Protective Order by plaintiffs; exhibits 1-3. (Attachments: # <u>1</u> Document Continuation # <u>2</u> Document Continuation # <u>3</u> Document Continuation)(JGilb,) (Entered: 08/19/2004)
06/09/2004	<u>41</u>	SUR-REPLY re <u>24</u> MOTION to Dismiss filed by all plaintiffs. (MOre,) (Entered: 06/14/2004)
06/09/2004	<u>40</u>	ORDER denying <u>38</u> Motion for Leave to File- Signed by Honorable John Corbett O'Meara (MOre,) (Entered: 06/14/2004)
06/07/2004	<u>39</u>	CERTIFICATE OF SERVICE by all plaintiffs' re <u>38</u> MOTION for Leave to File. (SMar,) (Entered: 06/10/2004)
06/07/2004	<u>38</u>	EX-PARTE MOTION for Leave to File a Sur-Reply to Defendant's Motion to Dismiss by plaintiffs. (JGilb,) (Entered: 06/08/2004)
06/07/2004	<u>37</u>	NOTICE of hearing on <u>24</u> MOTION to Dismiss. Motion Hearing set for 7/23/2004 02:00 PM before Honorable John Corbett O'Meara. (DGoo,) (Entered: 06/07/2004)
06/03/2004	<u>36</u>	ORDER granting <u>35</u> Motion for Leave to File Excess Pages- Signed by Honorable John Corbett O'Meara (JGilb,) (Entered: 06/07/2004)
06/02/2004	<u>35</u>	MOTION for Leave to File Excess Pages by CSX Transportation. (JGilb,) (Entered: 06/04/2004)
05/17/2004	<u>34</u>	RESPONSE to <u>24</u> Motion to Dismiss filed by plaintiffs. (Attachments: # <u>1</u> Document Continuation # <u>2</u> Document Continuation # <u>3</u> Document Continuation # <u>4</u> Document Continuation)(JGilb,) (Entered: 05/18/2004)
05/05/2004	<u>33</u>	CERTIFICATE OF SERVICE of letter by plaintiffs. (PPaul,) (Entered: 05/05/2004)

		05/07/2004)
05/04/2004	<u>32</u>	NOTICE of hearing on <u>26</u> MOTION to Certify Class. Motion Hearing set for 1/28/2005 02:00 PM before Honorable John Corbett O'Meara. (DGoo,) (Entered: 05/04/2004)
05/04/2004	<u>31</u>	NOTICE of hearing on <u>24</u> MOTION to Dismiss. Motion Hearing set for 6/4/2004 02:00 PM before Honorable John Corbett O'Meara. (DGoo,) (Entered: 05/04/2004)
05/04/2004	<u>30</u>	AMENDED NOTICE of hearing on <u>24</u> MOTION to Dismiss, <u>26</u> MOTION to Certify Class. Motion Hearing set for 6/4/2004 02:00 PM before Honorable John Corbett O'Meara. (DGoo,) (Entered: 05/04/2004)
04/30/2004	<u>29</u>	CERTIFICATE OF SERVICE by Plaintiffs re <u>26</u> MOTION to Certify Class. (LBar,) (Entered: 05/04/2004)
04/30/2004	<u>28</u>	EXHIBITS 2-30, by plaintiffs,to their Related document: <u>26</u> MOTION to Certify Class.(JGilb,) (Entered: 05/04/2004)
04/30/2004	<u>27</u>	EXHIBIT 1, by plaintiffs, to their Related document: <u>26</u> MOTION to Certify Class.(JGilb,) (Entered: 05/04/2004)
04/30/2004	<u>26</u>	MOTION for Certification of Case as Class Action by all plaintiffs. (JGilb,) (Entered: 05/04/2004)
04/27/2004	<u>25</u>	NOTICE of hearing on <u>24</u> MOTION to Dismiss. Motion Hearing set for 6/4/2004 02:00 PM before Honorable John Corbett O'Meara. (DGoo,) (Entered: 04/27/2004)
04/21/2004	<u>24</u>	MOTION to Dismiss by CSX Transportation. (RHutc,) (Entered: 04/26/2004)
04/01/2004	<u>23</u>	CERTIFICATE OF SERVICE by Robert Buchta re <u>20</u> Order, <u>21</u> Amended Complaint. (PPaul,) (Entered: 04/13/2004)
03/31/2004	<u>22</u>	CASE management schedule Signed by Judge John Corbett O'Meara. (PPaul,) (Entered: 04/13/2004)
03/29/2004	<u>21</u>	AMENDED COMPLAINT filed by all plaintiffs against CSX Transportation, jury demand (PPaul,) (Entered: 04/13/2004)
03/29/2004	<u>20</u>	ORDER Allowing Amended Complaint Signed by Judge John Corbett O'Meara. (MOre,) (Entered: 04/12/2004)
03/26/2004	<u>19</u>	NOTICE of submission of proposed case scheduling order by plaintiffs (Attachments: # <u>1</u> Exhibit 1-2)(PPaul,) (Entered: 04/05/2004)
03/26/2004	<u>18</u>	Letter from defendant to Court regarding case management schedule, attachments (PPaul,) (Entered: 04/05/2004)
03/11/2004		Minute Entry -Motion Hearing held on 3/11/2004 re <u>10</u> MOTION by CSX Trans for entry of case management order with proposed order attached, attachments 1-4 and proof of service filed by CSX Transportation before Honorable Donald A Scheer. Disposition:

		DENIED (Tape #04-021) (VSim,) (Entered: 03/17/2004)
02/12/2004	<u>13</u>	NOTICE of hearing on <u>10</u> Motion for Miscellaneous Relief.MOTION by CSX Trans for entry of case management order with proposed order attached, attachments 1-4 and proof of service Motion Hearing set for 3/11/2004 02:00 PM before Honorable Donald A Scheer. (VSim,) (Entered: 02/13/2004)
02/10/2004	<u>17</u>	ORDER REFERRING MOTION to Magistrate Judge Scheer: <u>10</u> Motion for entry of order filed by CSX Transportation Signed by Judge John Corbett O'Meara. (CMul,) (Entered: 02/20/2004)
02/03/2004	<u>16</u>	CERTIFICATE OF SERVICE re <u>14</u> Sur-reply and <u>15</u> MOTION for Leave to File Sur-reply. (CMul,) (Entered: 02/17/2004)
02/03/2004	<u>15</u>	MOTION for Leave to File sur-reply brief by Brian Kahn. (CMul,) (Entered: 02/17/2004)
02/03/2004	<u>14</u>	SUR-REPLY to <u>10</u> Motion for entry of case management order by all plaintiffs. (CMul,) (Entered: 02/17/2004)
01/26/2004	<u>12</u>	REPLY to Response <u>10</u> to Motion for entry of case management order filed by CSX Transportation. (DTyle,) (Entered: 02/09/2004)
01/09/2004	<u>11</u>	RESPONSE by Brian Kahn to motion for entry of case management order by CSX Trans [10-1] with attachments 1-8 and proof of service (lg) (Entered: 01/12/2004)
12/18/2003	<u>10</u>	MOTION by CSX Trans for entry of case management order with proposed order attached, attachments 1-4 and proof of service (lg) (Entered: 12/19/2003)
11/21/2003	<u>9</u>	NOTICE by CSX Trans of notice of non-party fault with proof of service (lg) (Entered: 11/24/2003)
09/26/2003	<u>8</u>	DISCOVERY plan jointly filed pursuant to Fed. R. Civ. P. 26(f) (nh) (Entered: 09/29/2003)
09/17/2003	<u>7</u>	MOTION by defendant CSX Trans to admit Richard E. Schartz, Esq., and Andrea D. Rose, Esq. as attorneys for defendant pro hac vice ; with proof of service (dp) Modified on 09/18/2003 (Entered: 09/18/2003)
09/17/2003	<u>6</u>	APPEARANCE for defendant CSX Trans of attorney Mark D. Meeks; with proof of service (dp) (Entered: 09/18/2003)
09/10/2003	<u>5</u>	NOTICE by the court of setting scheduling conference for 2:45 10/1/03 with proof of service (nh) (Entered: 09/11/2003)
08/25/2003	<u>4</u>	AFFIRMATIVE defenses by defendant CSX Trans (dp) (Entered: 08/26/2003)
08/25/2003	<u>4</u>	ANSWER by defendant CSX Trans to complaint [1-1]; with proof of service and jury demand (dp) (Entered: 08/26/2003)
07/17/2003	<u>3</u>	AFFIDAVIT of Rachel Geiersbach regarding notice removal from

		Wayne County Circuit Court by CSX Trans [1-1] with notice of filing and proof of service (kg) (Entered: 07/18/2003)
07/11/2003	<u>2</u>	MOTION by defendant to extend time to file responsive pleading with brief (cm) (Entered: 07/15/2003)
07/11/2003	<u>1</u>	NOTICE by defendant CSX Trans of removal from Wayne County Circuit Court - Receipt # 490674 - Date Fee Received: 7/11/03 (cm) (Entered: 07/15/2003)
07/11/2002	<u>1</u>	COPY of complaint filed in Wayne County Circuit Court (cm) (Entered: 07/15/2003)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIAN KAHN,
et. al.,

Plaintiffs

v.

CSX TRANSPORTATION,

Defendant

Case No. 03-72652

Hon. John Corbett O'Meara

Magistrate Judge Donald A. Scheer

ORIGINAL

DEMAND FOR JURY TRIAL

CSXT'S MOTION FOR ENTRY OF CASE MANAGEMENT ORDER

CSX Transportation, Inc. ("CSXT") hereby moves for entry of the attached case management order (Tab 1) as the road map for the next phase of this action. Under this proposed order -- which is patterned after comparable orders issued in environmental cases like this -- plaintiffs would be expected, before this case proceeds further, to make a preliminary showing sufficient to convince this Court that their claims are supported by sufficient facts and opinions to set forth *prima facie* causes of action for nuisance, trespass, and negligence. It is axiomatic that one should not file a suit unless and until he has adequate reason to believe that he is injured and that the defendant caused the injury. In this case, despite a productive and continuing dialogue between counsel, plaintiffs have put forward nonspecific and unsupported allegations of wrongdoing and harm -- and no reason recognized at law for this case to involve CSXT. Before CSXT, and this Court, are forced to bear the enormous burden that this case will require, plaintiffs should make some basic showing that their claims are plausible and coherently connected to CSXT.

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Courts eventually decide whether pending claims have adequate factual or legal support. CSXT's proposed order will simplify that assessment here by requiring plaintiffs to provide facts and opinions that, in their view, justify why their claims should be allowed to proceed.

Plaintiffs' concurrence to this motion was sought and denied.

INTRODUCTION

This case is brought by 17 residents of Milford, Michigan, on behalf of themselves and (plaintiffs assert) approximately 5,000 other alleged Milford residents. Plaintiffs contend that their properties have been contaminated with substances from a nearby former-landfill site. Specifically, plaintiffs contend that the inorganic compounds aluminum, vanadium and lead have leached into groundwater. See Complaint, 5; Joint Rule 26(f) Report, 2 (attached for the Court's convenience at Tab 2). As a result, plaintiffs assert that their property values have decreased and that they fear becoming ill.

Defendant CSXT is a provider of freight transportation services. CSXT has never operated the site in question as a landfill. Instead, CSXT owns the land, and leased it decades ago to local government for use as a landfill. Plaintiffs' complaints stem from the use of this property as a landfill by these governmental entities. CSXT denies liability for the contamination alleged; denies that there is contamination of any sort at dangerous levels; and denies that plaintiffs have suffered injury compensable under applicable law.

Though the Complaint states claims for personal injury and property damage, plaintiffs concede that they have suffered no personal injury. See Joint Rule 26(f) Report, 2 ("Plaintiffs . . . concede that no plaintiff is presently ill with a disease thought to be related to these or any other alleged contaminant").

All parties agree that a staged case management plan will permit the most efficient and cost-effective management of the complex issues of (alleged) environmental contamination, medical and environmental causation, and property valuation presented by this case. *See* Joint Rule 26(f) Report, 2 (Tab 2). Indeed, with the Court's blessing this case is already proceeding in stages, with the initial 60-day pre-discovery information sharing period having recently been completed. The parties disagree, however, as to what the next stage of the case management plan should be.

ARGUMENT

A. THIS CASE SHOULD CONTINUE TO PROCEED IN STAGES.

Courts handling complex cases often look to creative means of "establishing early and continuing control so that the case will not be protracted because of lack of management," including "special procedures for managing potentially difficult or protracted actions" Fed. R. Civ. P. 16(a) & (c). The issuance of a staged case management plan falls comfortably within the Court's inherent authority to manage its docket, *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (the courts' inherent powers are governed "by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (quotation omitted)), and within the express authority conferred by Federal Rules of Civil Procedure 1 and 16.

Notably, the parties here agree that plaintiffs' claims raise complex issues that will be most efficiently handled by a staged case management approach. *See* Joint Rule 26(f) Report, 2 (Tab 2). In the parties' Joint Rule 26(f) Report, the parties proposed and this Court sanctioned a discovery and case management plan that proceeded in phases, with the first phase being a 60-day pre-discovery information-sharing period.

The question for the Court, then, is what the next litigation stage of this action should be.

B. A "LONE PINE"-TYPE CASE MANAGEMENT ORDER IS THE MOST SENSIBLE AND MOST EFFICIENT NEXT STAGE.

CSXT continues to believe a staged case management approach is the most efficient way for this case to proceed, and submits that the issuance of a *Lone Pine* type order, such as CSXT's proposed order (Tab 1), will best effectuate that goal.

Lone Pine orders take their name from a case, *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (Attached hereto for the Court's convenience at Tab 3), where -- like here -- plaintiffs alleged property contamination and personal injury related to the operation of a landfill. "*Lone Pine* orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation. In federal courts, such orders are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). When facing a *Lone Pine* order, plaintiffs are expected to produce some *prima facie* evidence supporting specified elements of their claims before defendant -- and the Court -- are forced to bear the burden of discovery and related litigation proceedings.

Lone Pine type orders are appropriate where, as here, the nature of plaintiffs' claims is uncertain and proof of causation and related science issues is likewise in doubt. The precise requirements of a *Lone Pine* order are tailored by the trial judge to best address the particular facts and circumstances in a given case.

For example, in *Acuna*, plaintiffs alleged personal injury and property damage from exposure to uranium mining activities. The district court, in two underlying actions, issued pre-discovery scheduling orders that required plaintiffs to establish certain elements of their claims

through expert affidavits. “Those affidavits had to specify, for each plaintiff, the injuries or illnesses suffered . . . that were caused by the alleged uranium exposure, the material or substances causing the injury . . . the dates or circumstances and means of exposure . . . and the scientific and medical bases for the expert’s opinions.” *Acuna*, 200 F.3d at 338. On appeal, the United States District Court for the Fifth Circuit affirmed the staged pre-trial procedure as within the district court’s discretion to manage the “complex and potentially very burdensome discovery that the cases would require.” *Id.* at 340.

Other courts have likewise condoned *Lone Pine* type orders as an appropriate way to control complex litigation raising complex causation and exposure allegations like those presented here. *See, e.g., Bates v. Shneider Nat. Carriers, Inc.*, 95 S.W.3d 309 (Tex. App. 2002) (trial court entered *Lone Pine* order in case filed by individuals alleging nuisance and related claims concerning plant emissions); *In re Jobe Concrete Prods., Inc.*, No. 08-01-00351-CV, 2001 WL 1555656 (Tex.App. Dec. 6, 2001) (unpublished opinion) (Attached hereto for the Court’s convenience at Tab 4) (trial court entered *Lone Pine* order requiring 12 representative plaintiffs out of 847 to provide exposure evidence supporting personal injury claims against concrete plant); *Martinez v. City of San Antonio*, 40 S.W.3d 587 (Tex. App. 2001) (upholding trial court’s granting of no-evidence summary judgment motion filed after plaintiffs’ *Lone Pine* submission); *In re Love Canal Actions*, 547 N.Y.S.2d 174 (N.Y. Sup. Ct. 1989) (court amended coordinated discovery orders in landfill exposure case requiring plaintiffs to provide to defendant

detailed documentation supporting each plaintiffs claim of injury based, in part, upon the court's inherent power of management).¹

Courts elsewhere control discovery in complex cases by fashioning comparable requirements without specific reference to *Lone Pine*, relying on the Court's broad discretion to manage and phase litigation proceedings. Typical in this regard is *Atwood v. Warner Electric Brake and Clutch Co.*, 605 N.E.2d 1032, 1035 (Ill. App. Ct. 1992), in which an Illinois appellate court invited defendants in a case alleging groundwater contamination with trichloroethylene (TCE) to file a motion requesting that plaintiffs be required to submit "some sort of certification." Defendants complied, and the court entered an order requiring plaintiffs to certify

¹ For instance, the *Love Canal* order provided, in pertinent part:

[P]rior to any further prosecution of a personal injury claim in these Love Canal actions, within six months . . . each plaintiff shall provide the following documentation to defendants:

(a) Facts, including street addresses for each plaintiff's exposure to a chemical at or from the old Love Canal landfill,

(b) reports of treating physicians and medical or other experts, supporting each individual plaintiff's claim of injury and causation thereof by exposure to chemicals from the old Love Canal landfill.

In re Love Canal Actions, 547 N.Y.S.2d at 179.

that each plaintiff had identified his or her medical or personal injury claims and the cause of those claims.²

CSXT's proposed order follows closely in format and substance *Lone Pine* orders issued in other cases. It would have plaintiffs provide individualized information specifying their claimed injuries and stating the basis upon which CSXT allegedly is liable. Like the order entered in *Love Canal* (see n. 1), it calls for evidentiary documentation relating to each plaintiff's (or plaintiff's property's) exposure to a chemical from the landfill and reports from professionals verifying the existence of injury causally related to the landfill. Like the order entered in *Atwood* (see n. 2), it asks for certifications that each plaintiff (or plaintiff's property) has been examined by the appropriate professional(s) that each plaintiff, his or her attorney, and/or his or her retained professionals deem necessary to evaluate their claims. Like the order entered in *Lone Pine* itself (attached at Tab 3), it calls for reports of real estate or other experts supporting each individual plaintiff's claim of diminution of property value.

² The *Atwood* order provided in pertinent part:

IT IS HEREBY ORDERED that on or before July 5, 1990, each individual plaintiff and his or her attorney shall certify that:

- (a) each plaintiff has been examined by each medical professional that the plaintiff, his or her attorney and/or his or her retained medical professional[s], consulting or otherwise, deem necessary to evaluate each individual plaintiff's medical, or personal injury, [*sic*] claims causally related to this case;
- (b) each plaintiff has identified all of his or her medical, or personal injury [*sic*] claims causally related to this case by way of the expert reports.
- (c) each plaintiff is ready to be deposed. It is further ordered that any medical, or injury, [*sic*] claim that is not fully identified in these reports[,] including, [*sic*] but not limited to, the prognosis of any injury or disease, and which is not identified as being causally related to exposure to materials which are the subject of these cases shall be barred.

Atwood, 605 N.E.2d at 1035-36.

This approach, like the approaches utilized by courts nationwide, not only is fair to all litigants -- since defendants are entitled to know what precisely they are defending -- but fosters judicial economy by identifying at this early stage whether there is "enough" to plaintiffs' case to permit it to proceed. Even should the case survive this preliminary stage, judicial economy is served insofar as the requisite showing by plaintiffs focuses and streamlines further proceedings.

C. DOUBTS RAISED SINCE THIS CASE'S FILING CONFIRM THE PROPRIETY OF A "*LONE PINE*" STAGE.

While the appropriateness of a *Lone Pine*-like case phase was apparent from the plain (and bare) allegations of the Complaint, developments since the filing of this case confirm its necessity.

With the Court's permission, the parties opened this case with an initial 60-day pre-discovery "information sharing" period. During this period, the parties exchanged information, and CSXT attempted to learn basic information about why it was in this case to begin with. The resulting information exchange took place through meetings with plaintiffs' counsel at his offices, through multiple telephone exchanges, and through sharing by plaintiffs of basic factual information about their properties.³

By the end of this sixty-day period, CSXT still was left to wonder why this case exists. Without belaboring the details of the parties' exchange, the fact remains that CSXT has not been informed of such basics as

- which specific chemical(s) have allegedly contaminated plaintiffs' individual properties;

³ The parties' discussions focused on plaintiffs' property damage claims, since plaintiffs confirmed, as the parties' Rule 26(f) report makes clear, that no plaintiff is ill with a compensable injury.

- the amount of alleged contamination;
- the time frame during which such contamination allegedly occurred, or
- the value of plaintiffs' properties purportedly lost.⁴

CSXT respectfully submits that litigants should not be expected to proceed in the dark, and that no one benefits when litigants and courts proceed headlong into complex environmental litigation absent some reason to believe that evidence and legal theories exist to create possible liability. It is precisely in circumstances like these that early-phase showings -- such as those outlined in the attached proposed order -- are in order.

D. CSXT'S PROPOSED ORDER REQUIRES ONLY INFORMATION THAT PLAINTIFFS SHOULD HAVE BEFORE FILING CLAIMS.

CSXT proposes the attached order in part based on its conviction that it does not ask much of plaintiffs. It, and *Lone Pine* orders like it, ask only that plaintiffs come forward with the sort, and quantum, of evidence they in good faith must have before initiating lawsuits like this.

As the Fifth Circuit has explained in issuing such an early-phase order:

The scheduling orders issued below essentially required that information which plaintiffs should have had before filing their claims pursuant to Fed.R.Civ.P. 11(b)(3). Each plaintiff should have had at least some information regarding the

⁴ Plaintiffs might maintain that justification for their claims is found in ongoing environmental remediation efforts at the landfill in question, including in government reports concerning these activities such as one issued recently by the Michigan Department of Environmental Quality ("MDEQ") (a full copy of which has not yet been received by CSXT.) This report issued as part of an ongoing investigation of the former landfill site being conducted by MDEQ with cooperation of local government entities who ran the former landfill and who -- unlike CSXT -- have been deemed "responsible parties" under Michigan law. For any number of reasons, this report cannot substitute for the information needed in this case and now sought by CSXT. For instance, the report does not address the claims plaintiffs may elect to pursue, their alleged damages, or the connection between their alleged damages and conduct by CSXT. Nor does this report, or other ongoing government activity, substitute for the evidence plaintiffs will need -- but appear to lack -- to establish exposure, causation and injury. More generally, ongoing regulatory activity features different legal requirements and regimes, different standards, and different environmental goals than those at issue in a civil lawsuit.

nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries.

Acuna, 200 F.3d at 340. CSXT, in short, asks merely that plaintiffs come forward with precisely the information that should be in their possession prior to filing suit. “[I]t is time that prior to the institution of [a landfill contamination] cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury, property damage and proximate cause.” *In re Lore v. Lone Pine*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (Tab 3).

CONCLUSION

CSXT respectfully requests that this Court enter its attached case management order, or such comparable case scheduling order as this Court deems just. The proposed approach is aimed at securing “the just, speedy, and inexpensive” determination of this unique action, as contemplated by Federal Rule of Civil Procedure 1, as well as at “discouraging wasteful pretrial activities” under Federal Rule of Civil Procedure 16(a).

Respectfully submitted,



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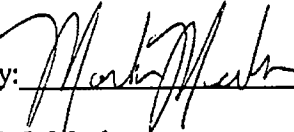
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Counsel for Defendant CSX Transportation, Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Defendant CSX Transportation's Notice of Nonparty Fault has been served by regular U.S. Mail upon: Peter W. Macuga, II, Esq., Macuga & Liddle, P.C., 975 E. Jefferson Avenue, Detroit, Michigan, 48207, attorney for plaintiffs, on this 18th day of December, 2003.

ANSPACH, MEEKS & NUNN, L.L.P.

By: 
Mark Meeks

Attorney for Defendant, CSX Transportation, Inc.

U.S. DIST. COURT
EAST DIST. MICH.
DETROIT-PSG

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EASTERN DISTRICT OF MICHIGAN

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